Supreme Court of the United States

October Term, 1943

No. 170

ARTHUR H. STOIKE,

Petitioner,

against

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel.

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CASES CITED

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Preliminary Statement

The petitioner seeks a writ of certiorari addressed to the Court of Appeals of the State of New York to review a decision of that Court to the effect that a night porter engaged in dusting, scrubbing and cleaning premises occupied by respondent and public corridors and washrooms in the tenant space of the First National Bank Building was not covered by the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. Sections 201-219).

This controversy was submitted to the Appellate Division of the Supreme Court of the State of New York, First Department, pursuant to Sections 546-8 of the New York

Civil Practice Act upon an agreed statement of facts, wherein petitioner claimed he was entitled to overtime compensation in accordance with the maximum hours provisions (Section 7a) of the Federal Fair Labor Standards Act, and the respondent denied that petitioner was so entitled. The Appellate Division granted judgment for the petitioner (264 App. Div. 585) and granted leave to respondent to appeal to the Court of Appeals of the State of New York, with a stay of judgment pending appeal, certifying that in its opinion a question of law was involved which ought to be reviewed by the Court of Appeals. The Court of Appeals reversed and entered judgment for respondent herein (290 N. Y. 195). The opinion of the Court of Appeals is attached hereto in an appendix, to which respondent respectfully refers this Court for a concise and complete statement of the position of respondent herein.

Statement of Facts

Petitioner was hired as a night porter to clean in such portions of the office building owned by respondent as were specified from time to time by the head night porter (3, 49).* The operation of the building was under the management of a real estate management agent. Petitioner was in the employ of respondent and on the payroll of the real estate management company for a period of 25 weeks subsequent to October 24, 1938, the effective date of the Fair Labor Standards Act, until April 15, 1939 when he voluntarily terminated his employment, and during such period was subject to the control of the building superintendent, who, like petitioner, was also on the payroll of the real estate management agent. Petitioner dusted tables, chairs, etc. and scrubbed floors and stairs in the banking quarters and mopped and cleaned the public cor-

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*References are to record folios.

ridors and wash rooms in the tenant space of the building (49, 50). While during the early part of his employment, both before and for a short time after the Fair Labor Standards Act became effective, petitioner did considerable work in the early part of each night in the banking quarters, during the latter part of his employment petitioner spent the greater part of his time cleaning the public corridors and washrooms on the floors occupied by tenants (50, 51).

During 15 of the 25 weeks of petitioner's employment subsequent to the effective date of the Fair Labor Standards Act petitioner worked forty-eight hours a week. These were the only weeks during that period in which petitioner worked hours in excess of the maximum 44 work week prescribed by the Act for the same period (53). Petitioner received a regular weekly wage of $27 a week or an average of 56.25 cents an hour on the basis of 48 hours a week (55). Petitioner claims he is entitled to overtime compensation in the amount of $50.63 plus a like amount as liquidated damages and the costs of this action (55, 56).

Respondent was chartered in 1863 and its charter has been renewed from time to time. Its sole place of business is No. 2 Wall Street, New York City. Outside thereof it maintains no offices, has no agents, and keeps no funds on deposit other than funds deposited with the Federal Reserve Bank of New York (5). Solely at said place of business, respondent performs the usual banking services for its customers, who include individuals, partnerships, corporations, banks and insurance companies. The customers, whether corporate or individual, whether depositors, borrowers, fiduciary customers or others, are located within and without the State of New York and are engaged in many lines of business, some of which constitute interstate commerce and some of which do not (25). The services performed for such customers include: conducting deposit accounts, lending money, making credit inquiries, and serving as executor, testamentary trustee, trustee under

inter vivos trusts, trustee under corporate indentures, depositary and escrow agent, transfer agent, or custodian of securities (26-41).

The building in which petitioner worked consists of 21 stories, the first four of which are occupied by the banking quarters of respondent and the remainder of which are rented to tenants as office space (6).

Pursuant to agreement dated October 27, 1932 between respondent and Horace S. Ely & Company, the latter became rental and management agent for the building, and since that time the latter has had complete charge of the maintenance and operation of the entire building, including the banking quarters.

Upon the basis of the foregoing facts, respondent claims that the Fair Labor Standards Act is wholly inapplicable and that petitioner is entitled to no recovery thereunder.

POINT I

To be entitled to judgment for overtime compensation under the Fair Labor Standards Act, it is necessary for petitioner to prove that he was engaged in interstate commerce or in the production of goods for interstate commerce.

Section 7(a) of the Fair Labor Standards Act in express and unmistakable terms grants the benefits of extra compensation for hours worked in excess of the maximum established therein only to those employees who are engaged in interstate commerce or in the production of goods for such commerce.

This Court in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524 (1942) expressly held that the applicability of the Act depends solely upon whether each particular employee's activities constitute interstate commerce or

the production of goods for interstate commerce and not whether the nature of the employer's business is such, in these words:

> "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

Warren-Bradshaw Drilling Co. v. *Hall,* 317 U. S. 88, and *McLeod* v. *Threlkeld,* 7 Labor Cases, § 51,162, are to the same effect.

POINT II

Petitioner was not engaged in interstate commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938.

A. Petitioner's activities, considered alone and without relation to any other activity carried on in respondent bank building, obviously did not constitute interstate commerce.

Petitioner's work in the banking quarters consisted of dusting chairs and tables, etc. and scrubbing floors and stairs (49). In the tenant space of the building, where during the latter part of his employment the greater part of his time was spent, petitioner mopped and cleaned the public corridors and washrooms (50-1). Such activities considered alone and without relation to any other activities could not conceivably constitute interstate commerce. They neither transcended State lines nor partook of the nature of commerce. In its opinion, the Court of Appeals at page 200 states:

> "In the argument before us counsel for the plaintiff conceded that dusting and cleaning, as performed under ordinary circumstances, do not constitute interstate commerce."

B. This Court expressly has held in several recent cases that an activity "convenient" or "necessary" to or "affecting" interstate commerce is not sufficient to satisfy the express requirement of the Fair Labor Standards Act that petitioner be engaged in interstate commerce itself.

In *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941) the Court, by Mr. Justice FRANKFURTER, drew a sharp distinction between being in interstate commerce and being in some activity merely affecting such commerce, in the following language at pages 351, 355:

> "* * * The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its 'break and take' assortments in Illinois as 'using unfair methods of competition in (interstate) commerce.' When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." (Citing among other laws, the National Labor Relations Act, Sections 2(7), 9(c) and 10(a).)
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> * * * * *
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> "The problem now before us is very different from that which was recently presented by *United States* v. *Darby* * * *. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

In *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942), this Court declared that the judicial task in each case is to determine whether Congress exercised its constitutional power to such an extent as to embrace the particular facts involved. The question to be answered is not what Congress had the power to do but what Congress did. Mr. Justice FRANKFURTER at page 520, *et seq.* wrote:

> "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.
>
> "The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, *e.g., Virginian Ry. Co.* v. *Federation,* 300 U. S. 515. Thus, while a phase of industrial enterprise may be subject to control under the National

Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. Compare, for example, *United Leather Workers* v. *Herkert*, 265 U. S. 457, and *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, with *Labor Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, and *Labor Board* v. *Fainblatt*, 306 U. S. 601. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

"We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. One need refer only to the history of Congressional control over the rates of intrastate carriers which affect interstate commerce, and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who 'shall, in any way directly or closely and substantially, affect' interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when

the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

"* * * The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston, E. & W. T. Ry. Co.* v. *United States, supra,* in that it was specifically made applicable to intrastate production which competed with goods produced in another State. S. 2475, 75th Cong., 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra,* as reported April 21, 1938; see H. Rep. 2182, *supra.*

"Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce', * * *"

In *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570, this Court by Mr. Justice DOUGLAS said:

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess.,

p. 5; 83 Cong. Rec., 75th Cong., 3rd Sess. Pt. 8, p. 9169. Moreover as we stated in *Kirschbaum Co.* v. *Walling, supra,* 522-523, Congress did not exercise in this Act the full scope of the Commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions 'affecting commerce.' But as we noted in the *Kirschbaum* case the Act did not go so far. * * *

"The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra,* p. 524."

Similarly in *Higgins* v. *Carr Bros. Co., Inc.,* 317 U. S. 572, this Court by Mr. Justice DOUGLAS said at page 574:

"* * * Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.,* that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act * * * and extended federal control to business 'affecting commerce'. But as we pointed out in *Kirschbaum* v. *Walling,* 316 U. S. 517, this Act did not go so far, but was more narrowly confined."

In *Overstreet, et al.* v. *North Shore Corporation,* 318 U. S. 125, Mr. Justice MURPHY stated, at page 128:

"Our starting point is respondent's concession that no question of constitutional power is involved, but only the ascertainment of Congressional intent,

that is, did Congress mean to include employees such as petitioners within the Act. In arriving at that intent it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522-23; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564."

In *McLeod* v. *M. C. Threlkeld, et al.,* 7 Labor Cases ¶51,162, this Court by Mr. Justice REED wrote as follows:

"In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' Sections 6 and 7. See the discussion and reference to legislative history in *Kirschbaum* v. *Walling,* 316 U. S. 517, and *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564. The selection of the smaller group was deliberate and purposeful."

It is therefore beyond contradiction that the petitioner must have been engaged in interstate commerce itself, rather than an activity "convenient" or "necessary" to or "affecting" interstate commerce, if he is to be included within the "commerce" coverage of the Act.

C. Petitioner's cleaning, dusting and mopping, either in the banking quarters or in the tenant space of the bank building, were not so closely related to any of the banking services performed in the banking quarters (assumed for the purpose of argument, but not conceded, to be interstate commerce) as to be practically a part thereof and therefore themselves to constitute interstate commerce.

Just as under the Federal Employers' Liability Act (45 U. S. C. A. § 51, *et seq.*), prior to its amendment in 1939, compensation for injury was provided only for those employees who suffer injury while employed in interstate commerce, so under the Fair Labor Standards Act of 1938 the benefits of overtime compensation are extended only to such employees as are engaged in interstate commerce or in the production of goods for such commerce. Cases decided under the former Act afford therefore a reliable criterion for determining under the Fair Labor Standards Act whether or not the activities of the petitioner constitute interstate commerce. In *Shanks* v. *Delaware, Lackawanna and Western Railroad Co.*, 239 U. S. 556, 558 (1915), this Court pronounced what has with monotonous regularity been recognized to be the "true test" in cases under the Federal Employers' Liability Act for determining whether or not an employee at the time of his injury was engaged in interstate commerce. That test was declared to be whether or not at such time despite the fact that the employer was engaged in interstate commerce, the employee was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

This Court in recent cases has applied the same test. In *McLeod* v. *M. C. Threlkeld, et al.*, 7 Labor Cases ¶ 51,162, Mr. Justice REED said:

> "In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. It is said that this Court decided an

employee, engaged in similar work was 'in commerce', under the Federal Employers' Liability Act and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.

"Judicial determination of the reach of the coverage of the Fair Labor Standards Act 'in commerce' must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum* v. *Walling, supra,* 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act.

* * * * *

"* * * The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

In *Overstreet, et al.* v. *North Shore Corporation,* 318 U. S. 125, Mr. Justice MURPHY wrote, at page 128:

"A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. §§ 51 *et seq.*) which, before the 1939 amendments (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce'. 35 Stat. 65. * * *

"We think that practical test should govern here.

* * * * *

> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

In cases under the Federal Employers' Liability Act, application of the "true test" has resulted in decisions which in each instance have depended upon the degree of physical proximity of the particular activity of the employee at the time of injury to some specific interstate transportation engaged in by the carrier. The principal object for which carriers exist is, of course, transportation, which is the very essence of commerce. See *Chicago Rock Island & Pacific Railway Co.* v. *Wright,* 239 U. S. 548, 550 (1916). This Court has refused to permit a recovery under the Act by employees who might be said to be engaged in activities closely related to the general business of the carrier as a whole but only remotely related, although ultimately necessary, to the actual movement of trains. Only twice has the Court wandered from the path, in *Erie Railroad Company* v. *Collins,* 253 U. S. 77 (1920) and *Erie Railroad Company* v. *Szary,* 253 U. S. 86 (1920), in both of which it was held that the employee was employed in interstate commerce within the meaning of the Act when he was engaged in preparing supplies of water and sand for later use by interstate engines. Both cases were later expressly overruled in *Chicago & Eastern Illinois Railroad Co.* v. *Industrial Commission,*

284 U. S. 296, 299 (1932). The ground for overruling such decisions was that the relationship between the activities of the employee at the time of his injury and the interstate transportation, for the purpose of which the railroad existed, was too remote. The "true test" as to whether an employee was engaged in "interstate commerce" within the meaning of the Act was whether or not his activities at the time of injury had such a close physical relationship to the "interstate transportation" of the carrier as to be a part thereof. By the same token, the "true test" in the case at bar must be whether or not plaintiff's cleaning, dusting and mopping had such a close physical relationship to specific banking services performed in the banking quarters as to be practically a part thereof. It would, of course, first be necessary to find that the particular banking services constituted interstate commerce.

The Court did not make the same mistake it made in the two Erie Railroad cases again. Naturally, employees engaged in the actual movement of trains across state lines have been held subject to the Act. *Chicago Rock Island & Pacific Railway Co.* v. *Wright*, 239 U. S. 548 (1916). But if the injury were received at a time when the interstate journey had not yet begun or had definitely terminated, the Act had no application. *McCluskey* v. *Marysville & Northern Railway Company*, 243 U. S. 36 (1917); *Illinois Central Railroad Company* v. *Peery*, 242 U. S. 292 (1916). *Cf. Philadelphia & Reading Railway Company* v. *Hancock*, 253 U. S. 284 (1920).

Injuries sustained by employees during the repair or clearance of fixed instrumentalities in use in interstate commerce such as tracks, tunnels and bridges were covered by the Act. *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company*, 229 U. S. 146, 151 (1913); *New York Central Railroad Company* v. *Porter*, 249 U. S. 168, 169 (1919); *Plass* v. *Central New England Railway Com-*

pany, 221 N. Y. 472 (1917); *Pallocco* v. *Lehigh Valley Railroad Company,* 236 N. Y. 110, 114 (1913). But the Act did not cover injuries received in the course of the construction of a new track, tunnel or bridge intended for use by interstate trains. The connection between such activity and the interstate commerce to which it ultimately contributes was physically too remote. *Raymond* v. *Chicago, Milwaukee & St. Paul Railway Company,* 243 U. S. 43 (1917); *New York Central Railroad Company* v. *White,* 243 U. S. 188, 192 (1917); *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company,* 229 U. S. 146, 152 (1913) (*dictum*).

Just as injuries sustained in the repair of fixed instrumentalities in use in interstate commerce came within the scope of the Act, so likewise did injuries received by employees while repairing or working upon movable instrumentalities such as locomotives or cars used in interstate commerce and not removed from service so long as to eclipse their identification with such commerce. *Walsh* v. *New York, New Haven and Hartford R. R. Co.,* 223 U. S. 1, 5 (1912); *North Carolina Railroad Company* v. *Zachary,* 232 U. S. 248 (1914). On the other hand, such injuries were not compensable under the Act where the engine or car being repaired, although it had been used in interstate commerce just prior to the repairs and would probably be so used subsequently, had been out of such service for too long a period and was undergoing repairs of too extensive a nature. To bring the employee within the Act, it was necessary that the repairs be merely a short interruption in an interstate haul. *New York, New Haven & Hartford Railroad Co.* v. *Bezue,* 284 U. S. 415, 420 (1932); *Minneapolis & St. Louis Railroad Company* v. *Winters,* 242 U. S. 353, 356 (1917); *Baltimore & Ohio Railroad Company* v. *Branson,* 242 U. S. 623 (1917, reversing 128 Md. 678, 98 Atl. 225, 230).

Most of the cases discussed above involved principally the question of the relation between the activity of the employee at the time of injury and the interstate commerce of the railroad in terms of time. In other words, if the activity of the employee during which he was injured took place too long before or after the interstate commerce to which it contributed, the relationship was too remote for the one to become a part of the latter.

Even more pertinent and persuasive in the instant case are those Federal Employers' Liability cases in which there was considered the physical relationship of the injured employee's activity to the interstate transportation of the carrier in terms of the identity of that activity with the transportation of the carrier. In other words, the ultimate question to be answered in each case was whether the employee's activity physically partook of the nature of transportation (*i. e.,* banking here), or was a separate and distinct activity. As was pointed out above, injuries sustained by an employee while directly repairing cars or locomotives in use in interstate commerce were compensable under the Act provided the cars or locomotives had not been out of service too long. But injuries suffered by employees while repairing or caring for machinery or shops used in the repair of such cars or locomotives were not within the Act. The work he performed in the railroad shop or roundhouse other than on the cars or locomotives themselves ultimately contributed to the interstate transportation but did not possess the inherent character of interstate transportation. *Shanks* v. *Delaware, Lackawanna and Western Railroad Company,* 239 U. S. 556, 559 (1916); *Illinois Central Railroad Company* v. *Cousins,* 241 U. S. 641 (1916, reversing 126 Minn. 172, 148 N. W. 58); *Chicago & North Western Railway Co.* v. *Bolle,* 284 U. S. 74, 80 (1931). The principle upon which the decisions in the foregoing cases were founded was stated at page 559 of the *Shanks* case, as follows:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis* case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

Exactly the same was true with respect to employees working with or upon supplies like coal or water for interstate locomotives. The Act applied to them if they were injured while directly coaling or watering such locomotives. *North Carolina Railroad Company* v. *Zachary*, 232 U. S. 248, 260 (1914); *Armbruster* v. *Chicago, Rock Island & Pacific Ry. Co.*, 166 Iowa 155, 147 N. W. 337, 346 (1914); *Southern Ry. Co.* v. *Peters*, 194 Ala. 64, 69 So. 611, 613 (1915). But if the injury occurred while the employee was engaged in mining, preparing or transporting the coal or other supplies for interstate locomotives prior to the actual loading of such supplies on the locomotives, the Act did not apply. Such activity of the employee, like that of the employee repairing machinery in the roundhouse, although it eventually contributed to the interstate transportation of the locomotive, did not partake of the nature of such transportation. Instead it was mining, fueling, or servicing. *Delaware, Lackawanna & Western Railroad Company* v. *Yurkonis*, 238 U. S. 439, 444 (1915); *Chicago, Burlington & Quincy Railroad Com-*

pany v. *Harrington*, 241 U. S. 177, 180 (1916); *Lehigh Valley Railroad Company* v. *Barlow*, 244 U. S. 183 (1917).

Under the Federal Employers' Liability Act the same principles have been applied with like results to the situation which most nearly resembles that presented in the instant case—namely, the injury to an employee while caring for or repairing a building or station owned by an interstate carrier and used by it in its interstate business. Such an employee has been held to be engaged in an activity of a type physically so different from interstate transportation as not to be a part of it.

In *Sullivan* v. *New York, New Haven & Hartford Railroad Co.*, 134 Atl. 795, 800 (Conn. 1926) the Court, after applying the "true test", held that a clerk in an interstate railroad station who was killed by the electric current while turning off the station lights after his regular clerking activities were completed, was not engaged in interstate commerce and that hence the state Workmen's Compensation Act rather than the Federal Employers' Liability Act applied. The Court reached its conclusion by comparing the employee's activity at the time of injury with the work of a station janitor similar to that of the plaintiff in the instant case. It stated at page 800:

> "If the decedent had been an employee of the defendant whose sole duty was to do janitor's duty at the station after all movement of goods or persons in commerce was over for the day, would he, while doing such work, be deemed to be engaged in interstate commerce, or in work so closely related to it as to be practically part of it? If the conclusion that he would not is correct as to such assumed employee, then the work which the decedent was engaged in at the time of the injury ought to be viewed from the same standpoint, and with a like result.
>
> "We are of the opinion that in so far as interstate commerce was concerned the janitor's work in which Sullivan was engaged when injured was a matter of indifference to interstate commerce; that, in fact, it was work 'out of commerce.'

> "In the instant case the current of electricity and the electric light, when being turned off, were not directly and immediately used in interstate transportation, and cannot reasonably be deemed a part of interstate commerce; the decedent, therefore, at the time of turning out the electric light, was not engaged in such commerce."

The New York courts are in accord with this view. In *Klochyn* v. *New York Central R. Co.*, 218 App. Div. 295, 296, 297 (3rd Dept., 1926) a carpenter injured while repairing a watchman's shanty at an interstate grade crossing in which the tools of a track repair gang were kept was held not to be engaged in interstate commerce so as to be subject to the provisions of the Act. The watchman himself was engaged in interstate commerce; so likewise was the track repair gang. But the carpenter's repair work on the shanty which housed both the watchman and the tools possessed so little of the nature of transportation as not to be a part of it. This was clearly pointed out by the Court as follows at page 296:

> "In the present case we think the claimant's work was too remote from interstate commerce. He was repairing the shanty to make it fit for its purpose, namely, to shelter the watchman and for the storage of tools. To the watchman, considering his health and welfare, the shanty was needful; to commerce, however, it was not directly essential; it was not so closely related to commerce as to be practically a part of it, a direct instrumentality of movement. Repairing the shanty is a step further removed from commerce movement than is the shanty itself and its use. As the shanty is needful to the watchman for shelter, so his clothing is needful to protect him while doing his work; still it could hardly be claimed that a man or woman who made necessary repairs to that clothing was engaged in interstate commerce. The fact that tools were kept in the shanty cannot affect the result. While the tools were stored they were withdrawn from commerce and it could hardly be said that every building in which track gangs kept their tools was directly connected with interstate commerce."

And the Court at page 297, after drawing an analogy between the shanty and an office building housing the clerks and officers of the railroad continued as follows:

> "* * * A carpenter repairing such an office building would not be held to be engaged in interstate commerce."

Upon exactly the same grounds the Court of Appeals in *Vollmers* v. *New York Central R. Co.*, 223 N. Y. 571 (1918), reversed a ruling by the Appellate Division, Third Department, to the effect that a plumber injured while repairing the pipes in an interstate passenger station was engaged in interstate commerce and came within the provisions of the Act. The Court relied upon *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556 (1916), discussed *supra*, as its authority.

Upon the same grounds the United States Supreme Court reversed a judgment of the Minnesota Supreme Court granting the benefits of the Act to an employee engaged in working upon an outhouse of an interstate passenger station. *Minneapolis & St. Louis Railroad Company* v. *Nash*, 242 U. S. 619 (1917), (reversing 131 Minn. 166, 154 N. W. 957).

The banking quarters, although essential to carrying on the banking functions, cannot be regarded as an instrumentality of interstate commerce, as for instance, a check, a draft or a note may be. The various documents of title used by banks may be instrumentalities of commerce, for they are employed in the actual transactions of commerce just as are railroad cars and tracks in transportation. But the banking quarters have no such particular identification with commerce itself, other than that the commerce must take place somewhere. They may more appropriately be compared with the railroad stations and buildings in the cases discussed above, in which without exception employees engaged in working in or upon such buildings were held not to be engaged in interstate commerce.

Moreover, the absurdity of comparing the relation between track workers on interstate railroads and the interstate transportation of such railroads with that between a night porter cleaning in the banking quarters and the bank's interstate banking functions such as the negotiation of bills, notes and checks need hardly be pointed out. Track clearance is by nature closely identified with transportation; but how can it reasonably be said that there is any such affinity between cleaning, dusting and mopping the banking quarters and, for example, the negotiation of bills, notes and checks? It cannot be said that cleaning in any way partakes of the nature of any of the usual interstate banking transactions. It is well-nigh impossible to conceive of an activity more remotely connected with interstate banking transactions than the cleaning activities of the plaintiff.

Plaintiff worked only at night when no banking activities whatsoever were carried on (49). *Sullivan* v. *New York, New Haven & Hartford Railroad Co.*, 134 Atl. 795 (Conn., 1926), *supra*. Never did he participate directly or indirectly in any activity even faintly resembling a banking function, not to speak of an interstate banking transaction. Nor did he ever handle any of the documents or other articles used in interstate transactions. His job, strikingly similar to that of the repairmen in the interstate railroad terminals noted above, was to dust tables, chairs, etc., and scrub floors and stairs in the banking quarters and to mop and clean the public corridors and washrooms in the tenant space (49, 50). The most that plaintiff can claim is that he worked in the same quarters where alleged interstate commerce transactions were carried on, and this, as was pointed out above, will not suffice to establish the necessary relationship.

The case of *Johnson* v. *Dallas Downtown Development Co.*, certiorari denied April 19, 1943, 318 U. S. 790, appears to be much in point. The petition for certiorari in that case stated that the petitioners were "elevator opera-

tors, maintenance men, porters and utility men employed in and necessary to the operation of Texas Bank Building, an office building owned and operated by the defendant, the majority of which building is occupied by persons engaged in commerce and in the distribution, sale, handling, and other processes of goods produced in commerce and for commerce, as alleged in their complaint." The petition also disclosed that the building located in Dallas, Texas, was occupied principally by offices of companies having their home offices outside of Texas and including many nationally known concerns, such as Pillsbury Flour Mills Company, Charles Scribner's Sons, Western Electric Company, American Blower Company, General Food Sales Co., Encyclopedia Britannica, and the manufacturers of such famous products as Old Dutch Cleanser, Lipton Tea, Jello, Maxwell House Coffee and Welch's Grape Juice. Other tenants were commission brokers, manufacturer's agents representing textiles, foods and machinery, and from these offices orders were solicited and instructions issued on which merchandise was shipped into the Southwest from factories in the East. Other offices were occupied by a selling subsidiary of oil well pumps manufactured outside Texas, a freight solicitor for an interstate railroad, the Brotherhood of Railway & Steamship Clerks affiliated with the American Federation of Labor. One of the offices was occupied by International News Service, a news collecting and disseminating cooperative. There were also advertising agencies, insurance companies, general contractors and consulting engineers, agencies soliciting national magazine subscriptions, an office engaged in making insurance investigations and reports, an office supply house and others. Six or seven of the petitioners were porters whose duty it was to clean up offices, empty cuspidors, clean waste baskets, keep the halls clean, paint the walls and floors on the inside of the building and clean both the private offices and also the halls and stairways of the building commonly used by tenants. The petition for certiorari states:

> "The work which the plaintiffs do is usual and customary work done in buildings and necessary to keep them clean in order to keep tenants in them * * *."

The United States District Court for the Northern District of Texas dismissed the complaint and held that the employees were not covered by the Fair Labor Standards Act. The United States Circuit Court of Appeals for the Fifth Circuit affirmed in 132 F. 2d 287, saying *inter alia*:

> "We do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of use or convenience or labor which in some fashion contributes to the comfort or convenience of another who is so engaged."

Among the reasons relied on for the allowance of the writ, the petitioners in *Johnson* v. *Dallas Downtown Development Company,* stated that the decision of the Fifth Circuit "conflicts with decisions by District Courts in other circuits, appeals from which are now pending in other Circuit Courts of Appeal and likewise conflicts with decisions by various state courts, appeals from which are pending and which are still subject to application to this Court for certiorari * * *."

The petition then goes on to state that "In this connection petitioners would show that the following cases involving the identical question here in issue are pending in various courts, and a decision herein would be determinative of all of them." The petition then cites the case at bar in these words:

> "(b) *Stoike* v. *The First National Bank of the City of New York,* 38 N. Y. Supp. 2d 390, appeal pending in Court of Appeals of New York."

The petition in the *Johnson* case went on to recite:

> "In well-reasoned opinions, one state court and one federal court upon this precise point have held that such maintenance employees and elevator operators in a building tenanted as was this one by persons engaged in commerce were themselves in commerce within the meaning of the Act. The Appellate Division of the Supreme Court of New York so held in Stoike *v.* First National Bank of the City of New York, 36 N. Y. Supp. 2d 390, and so did the District Court for the Northern District of California in Lorenzetti *v.* American Trust Co., 45 Fed. Supp. 128."

It thus appears from the petition for certiorari in *Johnson* v. *Dallas Downtown Development Company* that the petitioners in that case felt that the issues in their case were the same as those raised in the case at bar. In this connection it is interesting to note that not only has the Court of Appeals of the State of New York in the case at bar held that the petitioner here is not within the coverage of the Fair Labor Standards Act, but the Circuit Court of Appeals for the Ninth Circuit in an opinion dated August 17, 1943 has reversed the case of *Lorenzetti* v. *American Trust Co.* (45 Fed. Supp. 128) and in holding that the petitioners, some of whom were porters who did mopping and dusting and emptying of waste baskets, etc. in banks and office buildings, said that:

> "Since the submission of the cases, the Supreme Court has decided McLeod *v.* Threlkeld, ... U. S. .....
> The employers there were a partnership with a contract to furnish meals to maintenance-of-way employees of an interstate carrier, the meals being cooked and served in a railroad car attached to a particular gang of workmen and set on the railroad track conveniently to the place of the gang's activities. The employee concerned worked for the partnership as a cook in this car. He was held not within the coverage of the Act, the court saying that 'The test under this present Act, to determine whether an employee is engaged in commerce, is not whether the

employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it'. It was thought that employee activities outside of this movement, so far as they are covered by the wage-hour regulation, are governed by the phrase 'production of goods for commerce'.

"Here, as there, the employees concerned are not in any sense engaged in production nor are their activities integrated with the production of goods. Cf. Kirschbaum Co. *v.* Walling, 316 U. S. 517. The sole argument made on their behalf is that they are 'engaged in commerce'. We are compelled to disagree. Their work appears to us even more remote from the movement or stream of commerce than was the work of the cook in McLeod *v.* Threlkeld, *supra.* The holding in that case is controlling.

"The judgments are accordingly reversed."

A proper interpretation of the decisions of this Court on this issue is found in the language of Judge LEWIS speaking for the Court of Appeals of the State of New York in the case at bar (290 N. Y. 195, 203) where it is said:

"In our endeavor to interpret the phrase 'engaged in commerce' we adopt and apply to our present problem the 'practical test' suggested in *Overstreet et al.* v. *North Shore Corporation,* 317 U. S. —— —(decided Feb. 1, 1943)—Was the plaintiff's work of dusting and cleaning the defendant's banking quarters so closely related to interstate commerce as to be 'in practice and in legal contemplation a part of it.' (See also *Pedersen* v. *D. L. & W. R. R. Co.,* 229 U. S. 146, 151; *Shanks* v. *D. L. & W. R. R. Co.,* 239 U. S. 556, 560.) By the application of that test we think that one of those 'areas' which Congress chose not to occupy when it fixed the scope of section 7 (a) was employment such as the plaintiff's. It is our conclusion that the cleaning operations which plaintiff was

required to perform in defendant's banking quarters were not so closely related to the many banking services performed there that we can say as matter of law that plaintiff's cleaning was a part of such banking services and therefore that he was '*engaged in*' interstate commerce. The plaintiff's work of cleaning and dusting the quarters in which the functions of banking are performed, although it may contribute remotely to the comfort and convenience of those whose services are vital to its business, is not a step in the process of banking. Indeed, as we consider the activities of those who conduct the vital functions by which the business of the defendant bank is accomplished, the essential characteristics of that portion of its banking service which is interstate commerce are lost before we reach the position held by the plaintiff. If, under the guise of construing section 7 (a), we extend its application beyond those employees who are 'engaged in' interstate commerce and include that vast number of employees whose work, like that of the plaintiff, only remotely *affects* commerce, we would extend the operation of the Act beyond its intended scope."

POINT III

Petitioner was not engaged in production of goods for interstate commerce.

The plaintiff in his petition for certiorari (p. 2) states:

"Defendant also undertakes some production for commerce in that it prepares cashier's check and customer's credit reports, which are used in and transmitted in interstate commerce (p. 14, fols. 40-41). Many of the other services performed by the bank are actually production of goods under the definitions given in the Act."

The petitioner then goes forward at pages 8 to 12 to prove that banking is commerce, rather than production. Again at page 12, the petitioner urges that banking is production of goods for commerce and at page 13 says:

> "In a sense then a bank's whole business is production in commerce as that term is defined in the Fair Labor Standards Act."

The petitioner goes on to say that:

> "The bank in furnishing credit information, transmitting intelligence across State lines, financing the sale and purchase of goods to and from other States, sending out and receiving drafts with bills of lading attached, etc., engage in activities involving the physical distribution of goods in interstate commerce *and therefore production in commerce.*" (Emphasis ours.)

That this argument is an afterthought is attested by the fact that in none of the briefs submitted by petitioner in the two lower courts is there any assertion that banking is production of goods for commerce. True it is, as set forth by petitioner herein, that the Administrator of the Wage and Hour Division as *amicus curiae* in the two lower courts submitted in its briefs a point entitled "Plaintiff was engaged in commerce and/or the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938." That the point of production was labored in these briefs is apparent from the very "and/or" entitlement of the point itself. The fact remains that the Appellate Division of the Supreme Court in its opinion specifically stated that:

> "This case, therefore, involves solely a situation where plaintiff's employer is engaged in commerce, but it is not a case where the employee was in any wise engaged in the production of goods for commerce * * * The question to be decided in this controversy is whether the plaintiff in view of the nature of the work which he performed is to be deemed engaged in interstate commerce within the meaning of the Act."

Moreover, the Court of Appeals in its opinion stated:

> "The defendant, for the purpose of the argument only, concedes that at least a part of the banking services performed in its banking quarters constitutes interstate commerce. It contends, however, and the Appellate Division has recognized that this—'* * * is not a case where the employee was in anywise engaged in the production of goods for commerce'. (264 App. Div. 585, 586.) Accordingly the defendant's argument goes to the narrow question whether the plaintiff, at the time of his overtime employment, was 'engaged in' interstate commerce within the intended meaning of section 7 (subd. a) of the Act."

These two statements by the Appellate Division of the Supreme Court and the Court of Appeals of themselves indicate definitely that the lower courts were of the opinion that the question of production for interstate commerce, as distinguished from interstate commerce, was not before them for consideration, and emphasizes the fact that production of goods for commerce is seriously raised here for the first time.

The "Summary of Argument" in the brief filed by this petitioner with the Court of Appeals states that:

> "The plaintiff-respondent will argue:
>
> "A. That the defendant was engaged in Interstate Commerce.
>
> "B. That the plaintiff's activities were so close to and so much a part of defendant's interstate business as to make such work a part of that interstate business even under such precedented statutes as the Federal Employers' Liability Act.
>
> "C. That the Fair Labor Standards Act was meant to be and is broader in scope than the Federal Employers' Liability Act.
>
> "D. That as a consequence the plaintiff is covered by the Fair Labor Standards Act * * *."

The Court of Appeals therefore was accurate when in its opinion it said: "* * * plaintiff does not claim we are dealing with the problem of 'production of goods for commerce.'"

The petitioner devotes a considerable portion of his petition to the argument that banking is interstate commerce and then argues that because the bank is engaged in interstate commerce it must also be engaged in production of goods for commerce. The petitioner's argument, carried to its conclusion, is either one of two propositions. His argument is either that because banking is necessary to the production and sale of goods in modern complex industrial society and allegedly petitioner's work is necessary to banking, therefore petitioner is engaged in production. Or else, it is that the drawing of a cashier's check is actual production of goods for interstate commerce. Either argument, it would seem, must end in the conclusion that there no longer is such a thing as interstate commerce as it has been known through the generations, but interstate commerce has given way in its entirety to production of goods for interstate commerce. If because banking is necessary to production, therefore banking is production, then, since all business activities in modern economic society are dependent and interdependent upon one another, it must follow that all business activity, whether removed once, twice or a dozen times, becomes production of goods for interstate commerce. If the drawing of a cashier's check is the production of goods, then by the same token the writing of a letter of credit, or indeed the writing of any letter which evidences some business obligation, is production and again in its final analysis the petitioner's argument means that every business letter becomes production and there is no longer commerce, but only production.

The argument completely loses sight of the realities of the situation. The argument supposes that there are no longer such things as instrumentalities of commerce,

but only production. It loses sight of the fact that the debates in Congress specifically refer to both interstate commerce and the production of goods for interstate commerce. It loses sight of the fact that the definition of the word "goods" in the Act obviously relates to tangible manufactured products, and that the definition in the Act of the word "produced" obviously relates to tangible articles that are manufactured, mined or otherwise produced. The petitioner cannot blow both hot and cold. After spending a good portion of his petition to argue that banking is commerce within the definition of "commerce", as found in the Act, which by definition includes trade, commerce, transportation or communication among the several states, he then argues that banking is not commerce but is production. If banking is either one or the other, it obviously is commerce and not production.

Again the facts in *Johnson* v. *Dallas Downtown Development Co.* are in point. In that case, as noted above, the building was occupied by branch offices of nationally known companies engaged in production and distribution, as Pillsbury Flour Mills Company, American Blower Company, Fuller Brush Company, Charles Scribner's Sons, Western Electric Company, the manufacturers of Old Dutch Cleanser, Lipton's Tea, Maxwell House Coffee and Welch's Grape Juice. One of the tenants was a news collecting and disseminating agency. Other tenants included insurance companies, general contractors and engineers building and supervising construction outside of Texas, a company engaged in making insurance investigations and reports. The tenants in the case at bar, other than the First National Bank itself, the owner of the building, were dealers in securities, lawyers, coal merchants, accountants, management engineers, members of stock exchanges, etc. (10). If banking can possibly be construed to be production then *a fortiori* the work per-

formed by the various tenants in the *Johnson* case is much nearer a realistic concept of the production of goods of a physical and tangible nature than banking.

Even assuming *arguendo*—by a long stretch of the legal imagination—that banking is "producing" in the sense of manufacturing, mining, etc., still the work of a night porter is so far removed, it would seem, as to most certainly fall within that outer fringe of the orbit described by Mr. Justice FRANKFURTER in *Kirschbaum Co. v. Walling,* where at page 525 he wrote:

> "But because some employees may not be within the Act even though their activities are in the ultimate sense 'necessary' to the production of goods for commerce, * * *"

The debates of Congress indicate quite definitely that in dealing with the term "production of goods for commerce" and in dealing with the definitions of "goods" and "producing", Congress was dealing with the manufacture and the mining of tangible materials, and was not trying to destroy the distinction between interstate commerce and production of goods for interstate commerce.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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